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14 **UNITED STATES DISTRICT COURT**
15 **EASTERN DISTRICT OF MICHIGAN**
16 **WESTERN DIVISION**

17 NANCY KINDER, individually and on
behalf of all others similarly situated,

18 Plaintiff,

19 vs.

20 ELGA CREDIT UNION,

21 Defendant.

22 Case No.

23 **CLASS ACTION COMPLAINT**
DEMAND FOR JURY TRIAL

24
25 Now comes NANCY KINDER (“Plaintiff”), on behalf of herself and all
26 others similarly situated and alleges as follows:
27
28

INTRODUCTION

1. Plaintiff brings this action individually and on behalf of all others similarly situated against Defendant ELGA Credit Union alleging violations of the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.* and its implementing regulations 12 C.F.R. § 205 *et seq.* (hereinafter referred to collectively as the “EFTA”).

2. The Congressional findings and declaration of purpose regarding the EFTA are as follows:

(a) Rights and liabilities undefined

The Congress finds that the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers. However, due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers, financial institutions and intermediaries in electronic fund transfers undefined.

(b) Purposes

It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of this subchapter, however, is the provision of individual consumer rights.

15 U.S.C. § 1693.

3. Among other things, the EFTA imposes certain disclosure requirements upon operators of automated teller machines (“ATMs”).

4. 15 U.S.C. § 1693b(d)(3)(A) requires any ATM operator who imposes fees on consumers in connection with electronic fund transfers to provide notice of the fact that the fee is being imposed and the amount of the fee.¹

¹ “Electronic fund transfer” is defined as “any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, direct deposits or withdrawals of funds, and transfers initiated by telephone....” 15 U.S.C. § 1693a(6).

1 5. 15 U.S.C. § 1693b(d)(3)(B) identifies the location where the required
 2 notice must be posted as follows:

3 (B) Notice requirements
 4 (i) On the machine

5 The notice required under clause (i) of subparagraph (A) with respect
 6 to any fee described in such paragraph shall be posted in a prominent
 7 and conspicuous location on or at the automated teller machine at
 8 which the electronic fund transfer is initiated by the consumer.

9
 10 (ii) On the screen

11 The notice required under clauses (i) and (ii) subparagraph (A) with
 12 respect to any fee described in such subparagraph shall appear on the
 13 screen of the automated teller machine, or on a paper notice issued
 14 from such machine, after the transaction is initiated and before the
 15 consumer is irrevocably committed to completing the transaction....

16 6. The relevant implementing regulation, 12 C.F.R. § 205.16(c)
 17 reinforces EFTA's statutory posting requirement, mandating that the mandatory fee
 18 notice: 1) be posted in a "prominent and conspicuous location" on or at the ATM
 19 machine; and 2) "on the screen of the automated teller machine or by providing it
 20 on paper, before the consumer is committed to paying the fee." 12 C.F.R. §
 21 205.16(c)(1) and (2).

22 7. 15 U.S.C. § 1693b(d)(3)(C), and its implementing regulation, 12
 23 C.F.R. 205.16(e), prohibit ATM operators from imposing a fee on a consumer
 24 unless EFTA's notice and posting requirements are followed by the ATM operator.

25 8. Specifically, 15 U.S.C. § 1693b(d)(3)(C) states, in relevant part:

26 (C) Prohibition on fees not properly disclosed and explicitly assumed by the
 27 consumer

28 No fee may be imposed by any automated teller machine operator in
 29 connection with any electronic fund transfer initiated by a consumer
 30 for which a notice is required under subparagraph (A), unless—

31 (i) The consumer receives such notice in accordance with subparagraph
 32 (B)...

JURISDICTION AND VENUE

9. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 1693 *et. seq.*

10. Plaintiff's claims asserted herein arose in this judicial district and Defendant is the operator of ATMs in this judicial district.

11. Venue in this judicial district is proper under 28 U.S.C. § 1391(b) and (c) and 1400(a) in that this is the judicial district in which a substantial part of the acts and omissions giving rise to the claims occurred.

PARTIES

12. Plaintiff, Nancy Kinder, is and at all times relevant hereto was a resident of Fowlerville, Livingston County, Michigan.

13. Defendant, ELGA Credit Union is headquartered at 2303 S. Center Road, Burton, MI 48519.

14. Defendant is an automated teller machine operator, as that term is defined by 12 C.F.R. § 205.16(a) which states: “Automated teller machine operator means any person that operates an automated teller machine at which a consumer initiates an electronic fund transfer or a balance inquiry and that does not hold the account to or from which the transfer is made, or about which the inquiry is made.”

FACTS RELATED TO PLAINTIFF'S TRANSACTION

15. Specifically, Plaintiff made a cash withdrawal from Defendant's ATM at the following locations:

- (a) On or about July 22, 2009 Plaintiff made an electronic fund transfer at Defendant's ATM at 7026 Vienna Road, Clio, Michigan. Defendant charged Plaintiff a fee of \$1.50 in connection with the above-described transaction.
- (b) On or about August 1, 2009 Plaintiff made an electronic fund transfer at Defendant's ATM at 8415 Davison Road, Davison, Michigan. Defendant charged Plaintiff a fee of \$1.50 in connection with the above-described transaction.
- (c) On or about August 3, 2009 Plaintiff made an electronic fund transfer at Defendant's ATM at 1390 North Leroy Street,

1 Fenton, Michigan. Defendant charged Plaintiff a fee of \$1.50 in
 2 connection with the above-described transaction.

3 (d) On or about August 4, 2009 Plaintiff made an electronic fund
 4 transfer at Defendant's ATM at 799 Harrison Street, Lapeer,
 Michigan. Defendant charged Plaintiff a fee of \$1.50 in
 connection with the above-described transaction.

5 (e) On or about August 4, 2009 Plaintiff made an electronic fund
 6 transfer at Defendant's ATM at 2303 South Center Road,
 Burton, Michigan. Defendant charged Plaintiff a fee of \$1.50 in
 connection with the above-described transaction.

7 (f) On or about August 4, 2009 Plaintiff made an electronic fund
 8 transfer at Defendant's ATM at 5080 Corunna Road, Flint,
 Michigan. Defendant charged Plaintiff a fee of \$1.50 in
 connection with the above-described transaction.

10 16. At the time of the above-described electronic transaction, Plaintiff did
 11 not maintain any accounts with Defendant.

12 17. However, at the time of the above-described transaction, there was no
 13 notice posted "on or at" the ATM operated by Defendant apprising consumers that
 14 a fee would be charged for use of the ATM.

15 18. Because Defendant did not post the required notice, it was not
 16 permitted to charge a usage fee to Plaintiff and other class members.

17 **CLASS ACTION ALLEGATIONS**

18 19. Plaintiff brings this class action on behalf of herself and all other
 similarly situated pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil
 20 Procedure.

21 20. Plaintiff seeks to represent a class of persons to be defined as follows:

22 All persons who: 1) were charged a "terminal owner fee" at an
 23 ATM operated by Defendant when such persons made an electronic
 fund transfer and/or balance inquiry where, 2) no notice indicating
 24 that such fee was to be charged was posted on the outside of the ATM
 machine.

25 21. Numerosity: The class described above is so numerous that joinder of
 26 all individual members in one action would be impracticable. The disposition of
 27 the individual claims of the respective class members through this class action will
 28 benefit both the parties and this Court.

1 22. Plaintiff is informed and believes, and thereon alleges, that there are at
 2 minimum, thousands of members of the class described above.

3 23. The exact size of the class and the identities of the individual members
 4 thereof are ascertainable through Defendant's records.

5 24. Members of the class may be notified of the pendency of this action by
 6 techniques and forms commonly used in class actions, such as by published notice,
 7 e-mail notice, website notices, first class mail, or combinations thereof, or by other
 8 methods suitable to this class and deemed necessary and/or appropriate by this
 9 Court.

10 25. Typicality: Plaintiff's claims are typical of the claims of the members
 11 of the class. The claims of the Plaintiff and members of the class are based on the
 12 same legal theories and arise from the same unlawful and willful conduct.

13 26. Plaintiff and members of the class were each consumers who used an
 14 ATM machine operated by Defendant to make an electronic fund transfer or
 15 balance inquiry and were charged a terminal owner fee, notwithstanding that the
 16 posting providing notice of the fee required by EFTA "on or at" Defendant's
 17 terminals was not present.

18 27. Common Questions of Fact and Law: There is a well-defined
 19 community of interest and common questions of fact and law affecting members of
 20 the class.

21 28. The questions of fact and law common to the class predominate over
 22 questions which may affect individual members and include the following:

- 23 a. Whether, under 15 U.S.C. § 1693b(d)(3)(A) and 12 C.F.R.
 24 205.16, Defendant was, at all relevant times, an automated teller
 25 machine operator that imposed a fee on consumers for providing
 26 host electronic fund transfer services to those consumers;
- 27 b. Whether Defendant complied with the notice requirements of 15
 28 U.S.C. § 1693(d)(3)(B) and 12 C.F.R. 205.16; and,
- 28 c. Whether Plaintiff and members of the class are entitled to
 29 statutory damages, costs and/or attorneys' fees for Defendant's
 30 acts and conduct.

1 29. Adequacy of Representations: Plaintiff is an adequate representative
2 of the class because her interests do not conflict with the interests of the members
3 of the class. Plaintiff will fairly, adequately, and vigorously represent and protect
4 the interests of the members of the class and has no interests antagonistic to the
5 members of the class. Plaintiff has retained counsel who is competent and
6 experienced in the prosecution of class action litigation.

7 30. Superiority: A class action is superior to other available means for the
8 fair and efficient adjudication of the claims of the class. While the aggregate
9 damages which may be awarded to the members of the class are likely to be
10 substantial, the damages suffered by the individual members of the class are
11 relatively small. As a result, the expense and burden of individual litigation makes
12 it economically infeasible and procedurally impracticable for each member of the
13 class to individually seek redress for the wrongs done to them. Plaintiff does not
14 know of any other litigation concerning this controversy already commenced by or
15 against any member of the class. The likelihood of the individual members of the
16 class prosecuting separate claims is remote. Individualized litigation would also
17 present the potential for varying, inconsistent, or contradictory judgments, and
18 would increase the delay and expense to all parties and the court system resulting
19 from multiple trials of the same factual issues. In contrast, the conduct of this
20 matter as a class action presents fewer management difficulties, conserves the
21 resources of the parties and the court system, and would protect the rights of each
22 member of the class. Plaintiff knows of no difficulty to be encountered in the
23 management of this action that would preclude its maintenance as a class action.

SUBSTANTIVE VIOLATION

31. 15 U.S.C. § 1693b(d)(3)(A) provides that as a prerequisite to
imposition of a usage fee upon a consumer for host transfer services, an automated
teller machine operator must provide notice to the consumer consistent with
subparagraph (B) of that statutory section.

1 32. Subparagraph (B) of 15 U.S.C. § 1693(d)(3) provides in relevant part:

2 (B) Notice requirements

3 (i) On the machine

4 The notice required under clause (i) of subparagraph (A) with respect
 5 to any fee described in such subparagraph shall be posted in a
 6 prominent and conspicuous location on or at the automated teller
 7 machine at which the electronic fund transfer is initiated by the
 8 consumer.

9 33. In turn, subparagraph (c) of 15 U.S.C. § 1693b(d)(3) states, in relevant
 10 part:

11 (C) Prohibition on fees not properly disclosed and explicitly assumed by the
 12 consumer

13 No fee may be imposed by any automated teller machine operator in
 14 connection with any electronic fund transfer initiated by a consumer
 15 for which a notice is required under subparagraph (A), unless—

16 (i) The consumer receives such notice in accordance with subparagraph
 17 (B)...

18 34. EFTA's statutory notice requirements are reinforced by the
 19 implementing regulations set forth at 12 C.F.R. § 205.16.

20 35. Defendant violated the notice requirements of EFTA in connection
 21 with providing host transfer services to Plaintiff and the Class.

22 36. Defendant was prohibited from imposing any usage fee or similar fee
 23 for providing host transfer services because it failed to comply with EFTA's notice
 24 requirements.

25 37. 15 U.S.C. § 1693m provides that Defendant shall be liable to Plaintiff
 26 and Class for violations of 15 U.S.C. § 1693 *et seq.* in the amount of, *inter alia*,
 27 statutory damages to be determined by the Court, the costs of this action and
 28 reasonable attorneys' fees.

29 38. Plaintiff seeks the imposition of statutory damages, costs of suit and
 30 attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and the members of the class, prays for:

- a. An order certifying the class and appointing Plaintiff as the representative of the class, and appointing counsel for Plaintiff as counsel for the class;
- b. An award to Plaintiff and the members of the class of statutory damages;
- c. Payment of costs of suit; and,
- d. Payment of reasonably attorneys' fees.

A TRIAL BY JURY IS DEMANDED.

Dated:
April 16, 2010

Respectfully Submitted:

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